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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

SURGICAL INSTRUMENT SERVICE
COMPANY, INC.,

Plaintiff,

v.

INTUITIVE SURGICAL, INC.,

Defendant.

Case No. 3:21-cv-03496-AMO

**DEFENDANT'S PROPOSED JURY
VERDICT FORM**

The Honorable Araceli Martínez-Olguín

1 Pursuant to Section II.A.3 of the Court’s Schedule and Pretrial Order, Dkt. 235, Intuitive
2 respectfully submits below its proposed jury verdict form. The parties have been unable to reach
3 agreement on the content of the proposed verdict form. Intuitive respectfully requests that the
4 Court adopt its proposed jury verdict form and reject SIS’s.

5 Intuitive’s verdict form refers the jury to the specific parts of the Court’s jury instructions
6 that apply to each claim, and also provides step-by-step directions as to how the jury should
7 proceed through the form. This is similar to the approach taken by the court in another recent
8 tying case, *see* Verdict Sheet, *AngioDynamics, Inc. v. C.R. Bard, Inc.*, No. 1:17-cv-00598
9 (N.D.N.Y. Oct. 6, 2022), ECF No. 474, and is appropriate in a case like this one involving
10 multiple claims with multiple elements. SIS’s proposed verdict form, by contrast, does not
11 include references to any particular jury instructions, and instead asks the jury to render a verdict
12 only by reference to the “instructions given.”
13

14 SIS’s proposed questions themselves are also misleading and likely to induce error, by
15 referring to some—but not all—of the elements of particular claims. For example, SIS’s
16 question regarding its exclusive dealing claim asks whether “Intuitive’s agreements with
17 hospitals substantially foreclosed hospitals from purchasing replacement and repaired EndoWrist
18 Instruments,” but this is both incorrect and incomplete. SIS seems to be confusing two different
19 elements of an exclusive dealing claim—proof of an agreement that is actually exclusive, and
20 proof that the agreement substantially forecloses competition in the relevant market—while
21 making no mention of other elements, including proof of market power in a properly defined
22 relevant market.
23

24 SIS also proposes no special interrogatories, which are encouraged in cases like this one.
25 *See Berkey Photo Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 279 (2d Cir. 1979) (urging use of
26 special verdicts or interrogatories to the jury in “large and complex cases” to resolve issues,
27 reduce probability of “laborious and expensive retrial,” and facilitate appellate review); *Pac. W.*
28

1 *Cable Co. v. City of Sacramento*, 672 F. Supp. 1322, 1326 (E.D. Cal. 1987) (quoting same).
2 Intuitive proposes two special interrogatories at the outset of the form to determine whether the
3 jury has found that SIS proved that each of its proposed relevant markets is a proper antitrust
4 market. If the jury answers “No” to either of these questions, then it cannot find for SIS on any
5 of its antitrust claims. Accordingly, Intuitive submits that it is appropriate to ask the jury these
6 threshold questions before it proceeds to answer any others in the form.
7

8 The parties’ verdict forms also differ in their treatment of SIS’s tying claim, in two
9 important ways. *First*, SIS proposes to ask the jury to decide its tying claim under the *per se*
10 rule, as well as the rule of reason. For the reasons set forth in Intuitive’s separately filed Trial
11 Brief and Brief in Support of Disputed Jury Instructions, SIS should not be permitted to present
12 any theory of *per se* illegality to the jury. *Second*, SIS proposes to omit any mention of a
13 business justification defense. The jury should be instructed on that defense for the reasons set
14 forth in Intuitive’s Brief in Support of Disputed Jury Instructions, and it should be the subject of
15 a separate question as it was in the *AngioDynamics* verdict form.
16

17 Finally, SIS’s proposed verdict form suggests that Intuitive’s common law unfair
18 competition claim should rise or fall with its Lanham Act claim, which is incorrect for the
19 reasons set forth in Intuitive’s Brief in Support of Disputed Jury Instructions. Instead, the jury
20 should determine whether Intuitive has proved that claim by evaluating the elements of the claim
21 itself.
22

23 Intuitive’s proposed verdict form is set out below.
24
25
26
27
28

Please deliberate and answer the Questions below.¹

SIS'S CLAIMS

Question 1

Did SIS prove, by a preponderance of the evidence, that there is a relevant market limited to surgical robots used in minimally invasive soft tissue (or "MIST") surgery in the United States?

Yes _____

No _____

Question 2

Did SIS prove, by a preponderance of the evidence, that there is a relevant aftermarket limited to EndoWrist repair and replacement in the United States?

Yes _____

No _____

If you answered "No" to either Question 1 or Question 2, then SIS has not proved any of its claims and you are finished with your deliberations with respect to all of SIS's claims; you must proceed to Question 10 to begin your deliberations regarding Intuitive's claims. If you answered "Yes" to both Question 1 and Question 2, then you must proceed to Question 3.

Question 3

Did SIS prove, by a preponderance of the evidence, all of the elements of an unlawful tying arrangement, according to the elements set forth in Instructions ____ of the Court's Jury Instructions?

Yes _____

No _____

If you answered "No" to Question 3, then SIS has not proved its tying claim and you are finished with your deliberations with respect to this claim; you must proceed to Question 5 to begin your deliberations regarding SIS's exclusive dealing claim. If you answered "Yes" to Question 3, then you must go on to answer Question 4.

¹ Throughout this draft verdict form, placeholders have been left for references to particular jury instructions, pending finalization from the Court as to the instruction numbering.

Question 4

Did Intuitive prove, by a preponderance of the evidence, a business justification for the alleged tying arrangement, according to Instruction ____ of the Court's Jury Instructions?

Yes _____ No _____

If you answered "Yes" to Question 4, then SIS has not proved its tying claim and you are finished with your deliberations with respect to this claim. If you answered "No" to Question 4, then you must address SIS's injury and damages in Question 9 and Question 10. Either way, you must first proceed to Question 5 to begin your deliberations regarding SIS's exclusive dealing claim.

Question 5

Did SIS prove, by a preponderance of the evidence, all of the elements of an unlawful exclusive dealing arrangement, according to the elements set forth in Instructions ____ of the Court's Jury Instructions?

Yes _____ No _____

If you answered "No" to Question 5, then SIS has not proved its exclusive dealing claim and you are finished with your deliberations with respect to this claim. If you answered "Yes" to Question 5, then you must address SIS's injury and damages in Question 8 and Question 9. Either way, you must first proceed to Question 6 to begin your deliberations regarding SIS's monopolization claim.

Question 6

Did SIS prove, by a preponderance of the evidence, all of the elements of unlawful monopolization, according to the elements set forth in Instructions ____ of the Court's Jury Instructions?

Yes _____ No _____

If you answered "No" to Question 6, then SIS has not proved its monopolization claim and you are finished with your deliberations with respect to this claim. If you answered "Yes" to Question 6, then you must address SIS's injury and damages in Question 8 and Question 9. Either way, you must first proceed to Question 7 to begin your deliberations regarding SIS's attempted monopolization claim.

Question 7

Did SIS prove, by a preponderance of the evidence, all of the elements of unlawful attempted monopolization, according to the elements set forth in Instructions ____ of the Court's Jury Instructions?

Yes _____ No _____

If you answered "No" to Question 7, then SIS has not proved its attempted monopolization claim and you are finished with your deliberations with respect to this claim. If you answered "Yes" to Question 7, then you must address SIS's injury and damages in Question 8 and Question 9.

Question 8

If your answers to the prior Questions have resulted in a finding that SIS has not proved any of its claims, then you are finished with your deliberations with respect to SIS's claims and you must proceed to Question 10 to begin your deliberations regarding Intuitive's claims. Otherwise, you must answer this Question.

Did SIS prove, by a preponderance of the evidence, all of the elements of injury and causation, according to the elements set forth in Instructions ____ of the Court's Jury Instructions?

Yes _____ No _____

If you answered "No" to Question 8, then SIS has not proved any of its claims and you are finished with your deliberations with respect to SIS's claims; you must proceed to Question 10 to begin your deliberations regarding Intuitive's claims. If you answered "Yes" to Question 8, then you must go on to answer Question 9.

Question 9

What amount, if any, do you award to SIS as compensatory damages for its claims, in accord with Instructions _____ of the Court's Jury Instructions?

You have now completed your deliberations with respect to SIS's claims. You must now proceed to Question 10 to begin your deliberations regarding Intuitive's claims.

INTUITIVE'S CLAIMS**Question 10**

Did Intuitive prove, by a preponderance of the evidence, all of the elements of unfair competition and false advertising under the Lanham Act, according to Instruction ____ of the Court's Jury Instructions?

Yes _____

No _____

If you answered "No" to Question 10, then Intuitive has not proved its claim for unfair competition and false advertising under the Lanham Act, and you are finished with your deliberations with respect to this claim. If you answered "Yes" to Question 10, then you must address Intuitive's damages in Question 13. Either way, you must proceed to Question 11 to begin your deliberations regarding Intuitive's claim for unfair competition.

Question 11

Did Intuitive prove, by a preponderance of the evidence, all of the elements of unfair competition, according to the elements set forth in Instructions ____ of the Court's Jury Instructions?

Yes _____

No _____

If you answered "No" to Question 11, then Intuitive has not proved its unfair competition claim and you are finished with your deliberations with respect to this claim. If you answered "Yes" to Question 11, then you must address Intuitive's damages in Question 13. Either way, you must first proceed to Question 12 to begin your deliberations regarding Intuitive's tortious interference with contract claim.

Question 12

Did Intuitive prove, by a preponderance of the evidence, all of the elements of tortious interference with contract, according to the elements set forth in Instructions ____ of the Court's Jury Instructions?

Yes _____

No _____

If you answered "No" to Question 12, then Intuitive has not proved its tortious interference with contract claim and you are finished with your deliberations with respect to this claim. If you answered "Yes" to Question 12, then you must go on to address Intuitive's damages in Question 13.

Question 14

If your answers to the prior Questions have resulted in a finding that Intuitive has not proved any of its claims, then you are finished with your deliberations with respect to Intuitive's claims. Otherwise, you must answer this Question.

What amount, if any, do you award to Intuitive as compensatory damages for its claims, in accord with Instructions _____ of the Court's Jury Instructions?

You have now completed your deliberations with respect to Intuitive's claims.

The Foreperson should sign and date this Verdict Form and inform the Court Security Officer that a unanimous verdict has been reached.

Dated: _____

By: _____
Jury Foreperson

CERTIFICATE OF SERVICE

On October 28, 2024, I caused a copy of Defendant's Proposed Jury Verdict Form to be electronically filed via the Court's Electronic Case Filing System, which pursuant to the Court's order of September 29, 2008, constitutes service in this action on counsel of record for Surgical Instrument Service Company, Inc.

Dated: October 28, 2024

By: /s/ Kenneth A. Gallo
Kenneth A. Gallo